No. 6123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

STEVE STANWORTH and MRS. STEVE STANWORTH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' OPENING BRIEF.

Upon Appeal from the United States District Court for the Territory of Alaska, Division Number One.

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Index

Pages

Statement of Case 1

On Motion to Dismiss Appeal 2

Question Involved 2

(Validity of Alaska Bone Dry Act)

Reason for asking re-examination of question 3

Genesis of Alaska Bone Dry Law 4

Local Option in Alaska 5

General Statute—Special Statute 8

Citations

Abatte v. U. S. (270 Fed. 735) 3, 9

Cunard v. Mellon (262 U. S. 100; 67 L. Ed. 904) 11

Cyc., Vol. 36, p. 1096 12

Cyc., Vol. 36, p. 1089 ..... 13, 16

Hartford v. Hartford (34 A. 483) 10

Kie v. U. S. (27 Fed. 371) 4

Koppitz v. U. S. (272 Fed. 96) 3

Peterson v. U. S. (297 Fed. 1000) 4

Simpson v. U. S. (290 Fed. 963) 4

U. S. v. Nelson (29 Fed. 202) 5

Statutes

Alaska Bone Dry Law 4, 8, 12

Alaska Session Laws 1915, ch. 7 (Petition to Congress) 7

Compiled Laws Alaska 1913:

Sec. 2571 (local option) 5

Secs. 2573, 2575, 2584 (licenses) 6

National Prohibition Act 8, 12

Willis-Campbell Act 10

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STATEMENT.

The indictment charges that on October 25, 1929, defendants (appellants here) had in their possession and under their control, in Alaska, certain intoxicating liquor—in violation of the Alaska Bone Dry Law (39 Stat. Ch. 53, p. 903).

Defendants having been convicted, one was fined $1000 and the other was sentenced to jail imprisonment for eight months: both defendants appeal.

ON MOTION TO DISMISS THE APPEAL.

Appellee has filed a motion to dismiss the appeal; alleging, as a ground therefor, that under Title 28, Section 225 U. S. C. A. the cause is not appealable—in that the offense charged is not punishable by imprisonment for a term exceeding one year and in that neither the Constitution nor any treaty or statute of the United States is involved.

Appellants contend that the motion should be denied, for the reason that the validity of the Alaska Bone Dry Law is in issue and said law is a statute of the United States; it having been passed by *Congress:* it is certainly *not* a law of any territory or of any state; and the fact that the law is *applicable* only to Alaska does not at all affect its fatherhood.

ON THE MERITS.

The question involved is this, to-wit:

> Has the Alaska Bone Dry Law been repealed by the National Prohibition Act: at least so far as concerns the punishment for mere possession of liquor?

The question is pertinent because under the National Prohibition Act the punishment for mere possession is a fine not exceeding $500 whereas under the Alaska Bone Dry Law the punishment may be a fine not exceeding $1000, and/or imprisonment not exceeding

one year—and the punishment imposed in the case at bar exceeds the punishment prescribed by the National Prohibition Act. The question was raised by Motion in Arrest of Judgment (P. R. p. 113) and Assignment

Reason For Asking a Re-Examination of the Question.

In four cases this court has answered in the negative the question propounded in the above heading; and we would not have the hardihood to trespass upon the time and attention of this busy tribunal by again presenting the matter, were it not for the fact that a change has been wrought in the National Prohibition Act which we hope, and think we have reason to believe, will induce the court to view the matter in a different light; and in this hope and belief we are encouraged by the reflection that by the said decisions no rules of property were established, and that no vested interests will be affected by a modification of, or an entire receding from, those decisions.

The four cases to which we have referred, are—in chronological order:

Abatte v. U. S. (270 Fed. 735)—decided Feb. 14, 1921—Judges Gilbert, Ross and Hunt sitting.—Opinion by Judge Gilbert: *Judge Ross dissenting.*

Koppitz v. U. S. (272 Fed. 96)—decided April 4, 1921—Judges Gilbert, Hunt and Wolverton sitting.—Opinion by Judge Hunt.

Simpson v. U. S. (290 Fed. 963)—decided May 28, 1923—Judges Gilbert, Rudkin and Wolverton sitting.—Opinion by Judge Rudkin.

Peterson v. U. S. (297 Fed. 1000)—decided April 21, 1924.—Judges Gilbert, Hunt and Rudkin sitting.—Opinion by Judge Hunt.

Of these cases, only the *Abatte* case goes into the question at any length: the other cases are all founded on that case and for the most part consist of only reaffirmations.

Genesis of the Alaska Bone Dry Law. The Presence In Alaska of Indians Was Simply An Existing Condition, But Not a Cause For That Enactment.

The opinion in the *Abatte* case is based on the inefficacy of the ordinary general statute to repeal a special statute—the argument being that the Alaska Bone Dry Law was a special statute enacted by Congress for Alaska "in pursuit of its policy of prohibition in Indian Country" (Report p. 736).

It is an error, we think, to assert that the motif for the enactment of the Alaska Bone Dry Law is to be found in the desire of Congress to keep whiskey out of "Indian Country". Alaska is not, and never has been, "Indian Country", in the generally accepted sense of the term "Indian Country" (*Kie v. U. S.*, 27 Fed. 371); and although undoubtedly Congress *could* treat Alaska as Indian Country is treated

(*U. S. v. Nelson* (29 Fed. 202) and "in the early days" *did* so treat it (in that soon after the acquisition of Alaska a law was enacted absolutely prohibiting the *bringing in* of liquor) yet such treatment ceased long before the enactment of the Alaska Bone Dry Law.

The cessation of such treatment was due to the changed conditions wrought by the great influx of population—the result of the extensive gold discoveries. By the year 1899 Alaska had become essentially "White Man Country"—with cities and towns, courts, churches, schools, newspapers, libraries, civic pride, public spirit and "all which adorns and embellishes civilized life". When these facts dawned upon Congress, that body recognized the changed conditions by giving Alaska a complete Civil and Criminal Code. Gone then was any idea that Alaska was to be treated as "Indian Country" was treated, with respect to the introduction of liquor therein; for the inhibition formerly on the Statute Books against the introduction of liquor into Alaska was repealed—not expressly repealed, it is true, but impliedly repealed by the enactment of absolutely incompatible legislation, viz.: A law was passed in 1899 ushering in a kind of *local option* for Alaska (see Compiled Laws of Alaska 1913, Sec. 2571 et seq.) and by said law both wholesale and retail liquor licenses were provided for; the licenses were to be issued by the judges of the courts on application showing that "a majority of the white male and female citizens over the age of

twenty-one years, within two miles of the place where intoxicating liquor is to be *manufactured,* bartered, sold or exchanged have in good faith consented": the license for wholesale liquor business was fixed at the sum of $2000,—that for bar rooms at $1000 (idem Secs. 2573, 2575). The sums derived from liquor licenses in incorporated towns were to inure to said town "for school and municipal purposes" (idem Sec. 630) and the sums derived from liquor licenses outside of incorporated towns were also to be devoted to public purposes (idem Secs. 305, 308). There were no restrictions except that liquor was not to be sold within a specified distance from a school or church (idem Sec. 2584) nor to a minor, an Indian or an intoxicated person (idem Sec. 2575) nor should women or minors be allowed to frequent saloons (idem Sec. 2574—sixth). It will be noted that the restrictions were not substantially different from those which obtained in many of the states—notably Oregon and Washington.

Under this law of Congress many licenses were issued, and the system continued without interruption or modification until the enactment in 1917 by Congress of the Alaska Bone Dry Law—effective January 1, 1918.

The origin of the Alaska Bone Dry Law was this, to-wit: in 1912 Congress had given Alaska a legislature and by 1914 Alaska had succumbed to the agitation for prohibition which was even then sweeping state after state. So that the legislature caused

a referendum to be had on the question of Wet and Dry: the Drys carried the day, and the legislature of 1915 petitioned *Congress* for a Dry Law, the *territory* being constitutionally unable to enact such a law (Alaska Session Laws 1915, Ch. 7, p. 7). The Alaska Bone Dry Law was the result of that petition. That law ante-dated the Volstead act by twenty months.

The eighteenth amendment had not been promulgated when the Alaska Bone Dry Law was passed but it was very evident that it soon would be promulgated, and the Alaska law was a kind of "foretaste" of the legislation which the Dry forces of the country had it in mind to cause Congress to enact when the power should have been given to that body—indeed the Alaska Bone Dry Law is so similar in so much of its verbiage and in so many of its provisions as to warrant the belief that he who drafted that Act also drafted the Volstead Act;—certainly the inspiration was the same—an inspiration born of the belief that intoxicating liquors should be forbidden to *all*—a belief that had no particular reference to Americans, Frenchmen, Germans, Indians, Negroes or any race, nationality or sex. Congress, of course, had the power to pass a prohibition law for Alaska even without the Eighteenth Amendment and, as we have seen, did pass such an Act in the Alaska Bone Dry Law; but the point we wish to stress is that it was not moved thereto by any solicitude lest liquor get into the hands of Indians. We think it apparent that if

the National Prohibition Act had been in force in Alaska at the time when the Alaska Bone Dry Law was being considered, the Alaska Bone Dry Law would never have been passed. There would have been no occasion for any such law; for the conditions in Alaska were no different from the conditions in the states (else Congress would never have passed the law, licensing saloons and breweries in Alaska) and the National Prohibition Act would have covered the whole ground—have met every emergency.

There is then no particular significance in the fact that the Alaska Bone Dry Law punishes the possession in Alaska of liquor, more severely than does the National Prohibition Act; it just happened that the Alaska law was passed first: true there were Indians in Alaska at the time but there is no more reason for saying that that fact was the *cause* of the Alaska Bone Dry Law than there is for saying that the presence of Indians in the United States was the cause of the National Prohibition Act.

Special Statute—General Statute.

The Alaska Bone Dry Law was a *special* (i. e. local) statute by virtue of the fact only that it applied only to Alaska; but it applied only to *Alaska* because Alaska had petitioned for a prohibition law and because Alaska was under the sole jurisdiction of Congress. It was a special—i. e. local—statute because

at the time of its enactment Congress had not the power to pass *any* prohibition law except a special statute applicable to territory under its sole jurisdiction.

Subsequently, however, the adoption of the eighteenth amendment endowed Congress with the power to pass a general prohibition law and Congress then passed the National Prohibition Act (in its original form). But the National Prohibition Act (in its original form) contained no *express* provision that it should apply to Alaska or to any other Territory; and, this being the condition at the time of the decision in the *Abatte* case, Judge Gilbert (who rendered the decision in that case) asked this question, to-wit:

> "What is there to show that the National Prohibition Act was intended to replace the Alaska Bone Dry Act? It is not to be found in the statute, which provides that the Constitution of the United States and all the laws thereof 'which are not locally inapplicable' shall have the same force and effect within the said territory as elsewhere in the United States. That is a general provision which is found in the organic act of all the territories. It is simply an extension of the laws of the United States to the territory. It does not stand in the way of or affect the construction of special congressional legislation solely for the territory."

Abatte v. U. S., 270 Fed. 763, 766.

The correct answer to Judge Gilbert's question, as and when propounded, well might be "Nothing"; and yet, if there had then been in the Volstead Act a clause expressly stating that

> "This Act shall apply *not only* to the United States but to all territory subject to its jurisdiction",

we apprehend that the question would never have been asked, or that if asked the correct answer would *not* have been "Nothing"; we think the then correct answer would have been evidenced by that very clause—and this, because a provision that "This Act shall apply to all territory subject to its (the United States') jurisdiction" would make the act apply to Alaska *just as pointedly—just the same*—as if Alaska had been specifically mentioned; for Alaska is "territory subject to its jurisdiction" and "the whole includes all of its parts" (*Hartford v. Hartford,* 34 A. 483—Conn.).

WILLIS-CAMPBELL ACT:

How then if Judge Gilbert's question were asked today? We think the correct answer would not be "Nothing", for on November 23, 1921 (after the decision in the *Abatte* case) Congress passed the Willis-Campbell Act (42 Stats. L. 223) by which it was provided:

> "Sec. 3. That this Act *and the National Prohibition Act* shall apply not only to the United

States *but to all territory subject to its jurisdiction* including Hawaii and the Virgin Islands."

(This section 3 now appears as Section 2 of the National Prohibition Act—see Section 2, Title 28, U. S. C. A.)

In the passing of the Willis-Campbell Act Congress will be presumed to have been cognizant of the *Abatte* case (and other adjudications) by which the National Prohibition Act had been held to be inapplicable to Alaska (and other places), and that Act (Willis-Campbell) is indicative of the desire of Congress to forestall any such future decision. Can there be any doubt that by this *express* extension Congress intended to establish a Federal Uniform Prohibition Act of ubiquitous application? Indeed the Supreme Court has said that the object, purpose and effect of said Section 3 of the Willis-Campbell Act was to make the field of operation of the National Prohibition Act "to coincide with that of the 18th Amendment" (*Cunard S. S. Co. v. Mellon,* 262 U. S. 100, 67 L. Ed. 904, middle 1st Col.).

In the light of all these facts it would seem to be futile to *now* plant the contention that the Alaska Bone Dry Law has not been repealed (at least so far as the punishment for possession is concerned) by the National Prohibition Act, on the distinction between a special statute and a general statute; for such distinction cannot obtain where both statutes are by the one sovereignty, on the same subject, bear on all

the people and are equally applicable to the same territory. The Alaska Bone Dry Law is not aimed at any evil which the National Prohibition Act does not take care of.

The situation then is this, to-wit: here are two statutes making it a crime to possess whiskey in Alaska, viz., the Alaska Bone Dry Law *passed by Congress in 1917* and prescribing a punishment by fine not exceeding $1000 or imprisonment not exceeding one year or both fine and imprisonment, *and* the National Prohibition Law *passed by Congress in 1919* (and its supplementary Act) prescribing a punishment only by fine not exceeding $500. Is there not a conflict? and does not the later statute repeal the former to the extent of the conflict? Here the offense charged is the possession of liquor in Alaska and

> "Where a statute prohibits a particular act and imposes a penalty for doing it and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and repeals the former and this whether the penalty is increased or diminished."
>
> 36 *Cyc.,* p. 1096, text and note 33-35-36, 128 Fed. 207, *U. S. v. One Bay Horse.*

The reason of course is that to the extent of the penalty at least there is a conflict.

Speaking of the repeal of a special or local statute by a general statute, it is said that that matter is after all *"a question of intention"* and that

"Such intention may also be made to appear by the words of the general act, by the subject-matter with which the general act is concerned, by other legislation on the same matter, by the surrounding circumstances, *by the purpose to be accomplished,* or by anything else to which reference may properly be had for the purpose of discovering the legislative intent. Thus where the clear general intent of the legislature *is to establish a uniform system throughout the state,* the presumption must be that local acts are intended to be repealed. *So also where an act is passed to carry into effect a general mandatory provision of the constitution all acts inconsistent therewith, although local, are repealed.*"

36 *Cyc.,* p. 1089, text and note 99 et seq.

Suppose for instance the case were reversed; that is to say, suppose the Alaska Bone Dry Law had never been enacted and the 18th Amendment had never been adopted; the situation in Alaska would have been this, to-wit:

There was a *special* (i. e., a local) statute of Congress allowing and licensing the sale and manufacture (and therefore the possession) in Alaska of whiskey, wine and beer (Compiled Laws of Alaska 1913, Sec. 2571 et seq.); while this Act is in full force Congress passes an Act *forbidding* the manufacture and/or sale and/or possession of liquor and provides therein that "said act shall apply to *all* the territory subject to the jurisdiction of the United States", could there then be

> any question that the former licensing act was repealed? We apprehend not; and yet the licensing act was a *special* (i. e., a local) statute and the supposedly new statute would be *in form* a general statute. The fact is, however, that a statute which by its terms applies *everywhere* is *ex vi termini* as much a special statute as it is a general statute—that is to say that the very universalness of the statute obliterates the distinction between General and Special; so that, in the given case we would not have a conflict between a Special Statute and a General Statute, but rather a conflict between two statutes of equal rank so far as Alaska is concerned; and as the latest enacted statute completely covers the subject matter of the former statute and was enacted by the same sovereignty it acts as a substitute, so far at least as concerns the punishment for an offense denounced by both statutes.

The *Abatte* and the *Koppitz* cases (supra) were decided *before* the passage of the Willis-Campbell Act. It is true that the *Simpson* case (supra) was decided *after* the passage of the Willis-Campbell act and yet follows the *Abatte* case; but it does not appear that the Willis-Campbell Act was at all brought to the attention of the court and it might well have been overlooked on account of the fact that its section 3 appears in some prints as section 2 of the National Prohibition Act as if it had been enacted at the same time as, and was a part of, the original National Pro-

hibition Act. In the *Peterson* case, however, the Willis-Campbell Act is mentioned and still the decision follows the *Abatte* case; but no authorities are cited, no reasoning given in the decision for the preserving of the *status quo ante;* and we cannot refrain from thinking that the decision in the *Peterson* case was based largely on the erroneous statements in the *Abatte* case which we have pointed out. In none of the said cases was it at any time brought to the attention of the court that Congress had abandoned the "Indian Country" idea that liquor should not be brought into Alaska, and had adopted instead the "Local Option" system for Alaska, and had continued that system down to the time of the enactment of the Bone Dry Law: on the contrary, Judge Gilbert in the *Abatte* case (speaking of the policy forbidding importation of liquor into Alaska) erroneously states:

> "and it was continued without interruption until the enactment of the Bone Dry Law" (*Abatte* case —page 270 Fed. 2nd par. on p. 73 B).

To conclude: The "Local Option" Act expressly sanctioned the manufacture, sale and possession of liquor in Alaska: the Bone Dry Act (a subsequent enactment) repeals the local option act and establishes prohibition; the National Prohibition Act (a subsequent statute) is a later enactment applicable to Alaska dealing with the subject of prohibition full, complete and drastic; and it is a substitute for the Bone Dry Act; for it was "passed to carry into effect a general mandatory provision of the Constitution and all acts

in conflict therewith although local are repealed." (36 *Cyc.* p. 1089, supra p. 13).

We trust then that the court will "not take it amiss" if we urge a reexamination of the question as to whether or not the Alaska Bone Dry Law has been repealed by the National Prohibition Act—at least to the extent of lessening the punishment for the mere *possession* in Alaska of intoxicating liquors. We urge

(I) That the judgment be reversed *in toto.*

(II) If not reversed *in toto,* then that the cause be remanded with instructions to sentence defendants only under the National Prohibition Act—as suggested by Judge Ross in the *Abatte* case (270 Fed. p. 740, last two paragraphs of his dissenting opinion).

Respectfully submitted,

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